2-26-2015

Drummond Financial Services LLC, Order on Motion to Strike Affidavit and to Disqualify Counsel

John J. Goger
Fulton County Superior Court, Judge

IN THE SUPERIOR COURT OF FULTON COUNTY
STATE OF GEORGIA

DRUMMOND FINANCIAL SERVICES, LLC; et al.,	)	
Plaintiffs,	)	**Civil Action File No.**
v.	)	**2014CV253677**
TMX FINANCE HOLDINGS, INC.; et al.,	)	**BUS 4**
Defendants.	)	

ORDER ON MOTION TO STRIKE AFFIDAVIT AND TO DISQUALIFY COUNSEL

This matter is before the Court on Defendants' Motion to Strike the Affidavit of Professor Patrick Longan and Plaintiffs' Motion to Disqualify Greenburg Traurig, LLP. Upon consideration of the parties' briefs, the record of the case, and oral arguments presented at the hearing on February 18, 2015, this Court finds as follows:

Defendants' Motion to Strike the Affidavit of Professor Patrick Longan

As an initial matter, Defense Counsel Greenberg Traurig, LLP ("GT") asks the Court to strike the Affidavit of Professor Patrick Longan, filed in support of Plaintiffs' Motion to Disqualify GT as counsel because the Court does not need an expert to testify as to his legal opinion of the conflict of interest rules. Plaintiffs argue that law professors often provide expert testimony on ethical issues and cite to a number of legal malpractice cases in which expert testimony was allowed, including another case in which GT offered legal expert testimony in support of a motion to disqualify. While this Court is capable of applying the conflict of interest rules and applying Georgia law, there is no risk of undue influence or prejudice as the motion to disqualify is being decided by the Court and not a jury. Therefore, Defendants' Motion to Strike the Affidavit is **DENIED** and will be considered to the extent the Court finds it helpful.

Motion to Disqualify Greenburg Traurig

All parties are in the title loan business. Plaintiffs, which include both brokers and direct loan providers, are suing Defendants (collectively, "TitleMax") alleging a nationwide campaign to steal customers by (1) illegally accessing customers' DMV records, (2) trespassing and confronting Plaintiffs' customers in parking lots to directly solicit customers, and (3) offering Plaintiffs' employees cash to refer customers to TitleMax. The Counts include misappropriation of trade secrets, unfair competition, tortious interference with prospective commercial relationships, trespass, civil conspiracy, attorneys' fees, litigation expenses and injunctive relief.

Defendant TitleMax of Georgia, Inc. has counterclaimed against Plaintiffs North American Title Loans, LLC and Cash Loans of Marietta (both Georgia companies) for violations of O.C.G.A. § 44-12-130 *et seq*. which restricts pawnbrokers from using the word "loan" in advertisements which has given these two companies an unfair competitive advantage. The Counterclaims are: (1) Unfair Competition in Violation of the Lanham Act, (2) Unfair Competition in Violation of the Uniform Deceptive Trade Practices Act, and (3) Civil Conspiracy. Several other Defendants have counterclaimed against several other Plaintiffs, including Wellshire and Meadowwood, alleging a widespread campaign to acquire confidential financial information from TitleMax. The Counterclaims are: (1) Trespass, (2) Conversion, (3) Civil Conspiracy and (4) Litigation Expenses.

Plaintiffs have filed similar suits in South Carolina and Texas alleging a similar nationwide scheme by TitleMax. Mark Trigg, a GT Shareholder in Georgia, is Lead Counsel for TitleMax in the South Carolina and Georgia lawsuits. GT has represented TitleMax in various matters since November 2007, including litigation and regulatory matters. Sheehan ¶ 12. There is a motion to disqualify pending in the case before the South Carolina Business Court, and while

there has not been an order issued, the Judge indicated at the hearing on the motion that GT would be disqualified from representing TitleMax in that case.

The parties disagree as to (1) whether SMR's affiliates were clients or if SMR was the sole client of GT, (2) whether SMR and GT's attorney-client relationship was an ongoing representation or separate discrete representations, and (3) whether the scope of GT's purported representation of the affiliates merits disqualification in this case. Plaintiffs argue that GT should not represent TitleMax in this current action due to its ongoing representation of Plaintiffs' affiliate, Select Management Resources, LLC ("SMR"). An attorney-client relationship was formed between GT and SMR began in April of 2006 through Scott Sheehan, a GT Partner in Texas, and John McCloskey, the General Counsel for both SMR and Plaintiff Entities. GT provided regulatory advice to SMR, "researching and analyzing issues specific to certain laws and regulations in Texas and Arizona and advising SMR on how those laws may affect consumer financial services and credit service organizations operating in those states." Sheehan Aff. ¶ 7. Plaintiffs argue that Mr. Sheehan knew that SMR was solely a management entity that provided business strategy, operating, and other support to its operational affiliates that were credit service organizations, or "CSOs," and reasonably knew that the advice he gave SMR was for the benefit of these affiliates. Therefore, Plaintiffs seek to expand the attorney-client relationship between GT and SMR to include SMR's operational affiliates, including Plaintiffs in this case. Plaintiffs also rely on a draft 2008 Conflict Waiver in which GT acknowledged that it "has previously represented, and may in future [sic] represent, Select Management Resources, LLC (***together with its affiliates***, 'Select') in connection with various legal matters for which the firm has been or may be been [sic] engaged from time to time" (emphasis added). Finally, Plaintiffs argue that the relationship between GT and SMR (and its

affiliates) was continuous and that Plaintiffs' first notice that GT no longer consider them clients was December 12, 2014, when Mr. Trigg filed an affidavit in South Carolina in support of his opposition to the motion to disqualify. Plaintiffs conclude that there was an ongoing attorney-client relationship between GT and Plaintiffs at the time GT undertook the adverse representation of TitleMax in this lawsuit in violation of Professional Rule of Conduct 1.7 and that they were impermissibly fired as clients in violation of the "hot potato" doctrine.

In contrast, GT argues that SMR was the only client, and that the attorney-client relationship did not extend to the affiliates. In support, they cite to the 2006 Engagement Letter that does not expressly refer to SMR's affiliates. Further, GT notes that between 2006 and 2014, only four GT attorneys (two in Houston, two in DC) billed 34 hours on 5 matters for SMR. Sheehan at ¶ 12. They contend that the relationship ended upon the resolution of each of the five matters. They argue that the fifth and final matter was resolved in July or August of 2014, ending the attorney-client relationship. Alternatively, they argue that Mr. McCloskey, Plaintiffs' General Counsel, would have no reasonable basis to believe that GT was still representing SMR (or its affiliates) after Mr. Sheehan's phone call to Mr. McCloskey in August of 2014 stating that GT had determined that there was no conflict of interest because they had not previously represented the SMR affiliates that were parties in the South Carolina suit. Likewise, they argue that Mr. McCloskey certainly would not believe that the relationship was ongoing after GT appeared on behalf of TitleMax in the South Carolina suit, contrary to Mr. McCloskey's wishes, on August 25, 2014. Either way, GT argues that the relationship ended before the present suit was filed on November 7, 2014. GT concludes that its representation of TitleMax is permissible because Plaintiffs were never clients, or alternatively, because it is not representing TitleMax in

the "same or a substantially related matter" in which TitleMax's interests are materially adverse to the interests of Plaintiffs, which would violate Rule 1.9 which applies to former clients.

I. Did GT's representation of SMR extend to its affiliates, including Plaintiffs?

The Court finds that Plaintiffs should be considered clients of GT. An attorney client relationship can be implied if the client reasonably believes that he or she is being represented by the attorney. *See Calhoun v. Tapley*, 196 Ga. App. 318, 319 (1990). "A 'reasonable belief' is one which is 'reasonably induced by representations or ... conduct' on the part of the attorney." *Id.* In other words, the relationship cannot be created unilaterally. *See Guillebeau v. Jenkins*, 182 Ga. App. 225, 231 (1987).

While no Georgia case law deals specifically with implied attorney-client relationships by virtue of an attorney's relationship with an affiliated company, the ABA Ethics Committee provided guidance in its Formal Opinion 95-390. The ABA suggests that a relationship may be implied with the affiliate companies if:

- The affiliate is an alter ego of the client (not necessary to find alter ego as a matter of law);
- The affiliate imparted confidential information to the lawyer with the expectation that it was being represented;
- There is a unity of interests between the affiliate and client (eg., corporate formalities are not observed, same management, same board or directors);
- A shared legal department and a management "so intertwined" that all members basically operate as a single corporate entity.

Here, Plaintiffs argue that SMR and its affiliates, including Plaintiffs, are so intertwined that they should be considered one client for conflicts purposes. SMR and Plaintiffs have common ownership, the same managing member, the same key management personnel and officers, the same legal department and General Counsel, and keep consolidated financial books

and records. Second, GT purportedly knew that SMR's affiliates would receive and rely on the advice given to SMR related to title lending because the affiliates, and not SMR, were the operating title lenders. Mr. Sheehan's July 2014 memo to SMR referred specifically to the CSOs that would be affected by particular regulations. Plaintiffs Meadowwood and Wellshire also aver they provided GT with proprietary information about their Texas operations in seeking the advice of counsel. Finally, Plaintiffs argue that the 2008 Conflict Waiver reaffirmed its belief that GT represented SMR's affiliates, including Plaintiffs. As such, the Court finds that an attorney-client relationship was formed between GT and SMR as well as its CSO affiliates, including Plaintiffs.

II. Were Plaintiffs Current or Former Clients when GT Accepted Representation of TitleMax in the Georgia Litigation?

Having established that an attorney-client relationship existed between GT and Plaintiffs, the Court must next decide whether the relationship ended before GT decided to represent TitleMax in this matter. If they are former clients who were only being represented in specific matters that have been resolved, Rule 1.9 applies to determine any conflict, or, if they are current, ongoing clients, Rule 1.7 applies.

The Court finds that GT was in an ongoing attorney-client relationship with SMR and its affiliates that did not end before GT undertook the nationwide defense of TitleMax against Plaintiff's claims.

> If a lawyer's employment is limited to a specific matter, the relationship terminates when the matter has been resolved. If a lawyer has served a client over a substantial period in a variety of matters, the client sometimes may assume that the lawyer will serve on a continuing basis. **Doubt about whether a client-lawyer relationship still exists should be clarified by the lawyer, preferably in writing, so that the client will not mistakenly suppose the lawyer is looking after the client's affairs when the lawyer has ceased to do so.**

Rule 1.3, cmt. 4 (emphasis added).

The payment of a fee is not dispositive but rather the basic question is whether advice or assistance was sought and received. *See Huddleston v. State*, 259 Ga. 45, 46-47 (1989).

GT maintains that its work for Plaintiffs was sporadic (5 matters in 8 years and only 34 hours billed by 4 attorneys). GT points to the Engagement Letter that limits its representation "to serving as limited engagement-legal counsel to [SMR] ... from time to time." GT has not billed SMR for any work since July 25. They argue that Mr. McCloskey could not have believed that the attorney-client relationship still existed after GT appeared on behalf of TitleMax in the South Carolina suit, contrary to Mr. McCloskey's wishes, on August 25, 2014. GT concludes that its relationship with SMR ended well before the present suit was filed on November 7, 2014.

In contrast, Mr. McCloskey, SMR's and Plaintiffs' General Counsel, avers that he believed that GT's representation was ongoing. In support of this belief, Plaintiffs cite an August 2014 email from Mr. Sheehan to Mr. McCloskey asking for a waiver of conflict so that GT could represent TitleMax in the South Carolina suit. In this email, Mr. Sheehan expressed his desire to "continue" his work on the Texas regulatory matter. Mr. McCloskey avers that he did not know until he saw the December 2014 Trigg Affidavit filed in the South Carolina action that GT no longer considered Plaintiffs as clients.

From the evidence presented, it is clear that Mr. Sheehan failed to unequivocally notify Plaintiffs' General Counsel of its termination of the attorney-client relationship. GT could have notified Plaintiff Entities' GC in a much more direct way (i.e., in writing) that it did not consider the affiliated companies to be clients, and even if they were clients by virtue of their close relationship with SMR, the representation was terminated as of July 25, 2014 when the last matter was completed. While GT did not bill SMR for any work after July 25, there were several emails in early August from Mr. Sheehan following up with Mr. McCloskey about advice

given. Most notably, in his August 7, 2014 email to Mr. McCloskey, Mr. Sheehan expressed his desire to "continue to represent Select Management." The burden is and should be on the attorney to clarify the status of an attorney-client relationship in the face of a clear conflict of interest issue. GT's attorneys failed to do so in this case.

Furthermore, GT's argument that SMR's General Counsel would reasonably have known that the relationship ended when GT appeared on behalf of TitleMax in South Carolina litigation in August is unavailing. The Court views the South Carolina, Texas, and Georgia cases, all of which contemplate the same allegations of a nationwide scheme against TitleMax, as a single matter for the purpose of its conflict of interest analysis.

III. Should GT be disqualified from representing TitleMax in the Present Suit?

Courts in Georgia have unanimously taken the position that disqualification is an "extraordinary remedy that should be granted sparingly." *Bernocchi v. Forcucci*, 279 Ga. 460, 462 (2005). *See also Levis v. State*, 312 Ga. App. 275, 282 (2011); *Hodge v. URFA-Sexton, LP.*, 295 Ga. 136, 139 (2014). "The right to counsel is an important interest which requires that any curtailment of the client's right to counsel of choice be approached with great caution." *Piedmont Hospital, Inc. v. Reddick*, 267 Ga. App. 68, 76 (2004). Disqualification not only curtails a client's right to counsel of choice, but results in expense and delay that are costly both to the client and to the administration of justice. *Id.* However,

> (a) A lawyer shall not represent or continue to represent a client if there is a significant risk that the lawyer's own interests or the lawyer's duties to another client, a former client, or a third person will materially and adversely affect the representation of the client, except as permitted in (b).
>
> (b) If client informed consent is permissible a lawyer may represent a client notwithstanding a significant risk of material and adverse effect if each affected client or former client gives informed consent in writing to the representation after [certain measures are taken].

Ga. Rules of Prof. Conduct, Rule 1.7(a) & (b). Conflict of Interest: General Rule. "As a general proposition, loyalty to a client prohibits undertaking representation directly adverse to that client without that clients' informed consent." *Id.*, cmt. 4. "Thus, a lawyer ordinarily may not act as advocate against a person the lawyer represents in some other matter, even if it is wholly unrelated." *Id.*

Here, Plaintiffs declined to waive any conflict of interest. Therefore, GT has a duty to Plaintiffs and cannot continue to represent Defendants in this litigation. As such, Plaintiffs' Motion to Disqualify Greenburg Traurig, LLP is **GRANTED** and Defendants should report to the Court in thirty (30) days as to its efforts to secure substitute counsel in the matter.

SO ORDERED this 26 day of February, 2015.

JOHN J. GOGER, JUDGE
Superior Court of Fulton County
Atlanta Judicial Circuit

Copies to:

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